In the

Supreme Court of the United States

October Term, 1967

No. 86

United States of America,

Appellant,

—v.—

Third National Bank in Nashville, Nashville Bank and Trust Company and William B. Camp, Comptroller of the Currency,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF OF APPELLEES THIRD NATIONAL BANK IN NASHVILLE AND NASHVILLE BANK AND TRUST COMPANY

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November, 1967

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QUESTIONS PRESENTED

1. Whether the District Court made findings on the material issues in the case on the basis of the proper standard of *de novo* review of the Comptroller's ruling.

2. Whether the District Court's finding that the convenience and needs of the community to be served by the merger clearly outweighed any anticompetitive effects of the merger was supported by substantial evidence, and whether this finding is, therefore, a complete basis for the affirmance of the District Court's judgment.

3. Whether there is any foundation in law, and on the facts adduced on this record, to support the Government's contention that appellee banks were required to show, and failed to show, that no other method than this merger was adequate to solve Trust Co.'s problems.

STATEMENT

General

This case involves one of the three bank mergers challenged in antitrust cases pending in the federal district courts at the time of the passage of the Bank Merger Act of 1966 (80 Stat. 7), which were not immunized against charges of violation of Section 7 of the Clayton Act and Section 1 of the Sherman Act[1] by that legislation.[2] This

[1] The Complaint attacked this merger both under the Clayton Act, Section 7 and under the Sherman Act, Section 1. The Government has abandoned its Section 1 contentions on appeal (G.B. 2).

[2] The 1966 legislation immunized from attack under Section 7 of the Clayton Act and Section 1 of the Sherman Act those mergers

case involves a challenge to the merger of Nashville Bank and Trust Company ("Trust Co."), a small bank in Davidson County, Tennessee (approximately $51 million in assets), into Third National Bank in Nashville ("Third National"), a larger institution (approximately $357 million in assets).

The merger did not change the relative market standing of the three major banks in Davidson County. Only once, on October 1, 1964, did Third National forge ahead of First American, its largest competitor, by a small margin. (Fdg. 66, R. 122) As indicated by the postmerger evidence introduced at the trial, Third National's share of the market declined (Fdg. 67, R. 122; Fdg. 87, R. 125), and some sixteen months after the merger Third National was again second in size in the community. (Fdg. 67, R. 122)

This case was tried after the passage of the Act in 1966 under the substantive standards of the new Act but without the special procedural devices established by that Act—the automatic stay order and the prohibition of suits against consummated mergers—which were designed to prevent the consequences of the "unscrambling" of banks, against which Congress had expressed its policy in the Act.[3] See *United States* v. *First City National Bank of*

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which had been consummated prior to the date of this Court's decision in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (June 17, 1963). § 2(a), 80 Stat. 9. Similarly immunized were mergers consummated before the date of the Act where no Government suit had been brought to challenge them. § 2(b). The other cases in the same category as this case, in terms of their procedural status under the 1966 legislation, are: *United States* v. *Crocker-Anglo National Bank*, —— F. Supp. ——, 36 Law Week 2273 (N.D. Cal., Oct. 30, 1967); *United States* v. *Mercantile Trust Co., Per Curiam Order*, —— U.S. ——, 36 Law Week 3159 (Oct. 16, 1967).

[3] See amended § 18(c) of the FDIC Act, 12 U.S.C. § 1828(c)(7)(A) and (C). The caption to the 1966 legislation makes it plain

Houston, 386 U.S. 361, 370-71 (1967). In the instant case, the merger of the two banks took place on August 18, 1964, subsequent to this Court's decision in the *Philadelphia* case, but prior to the 1966 legislation.

After a protracted trial, lasting six weeks and involving the evidence of 47 witnesses, all but one of whom testified in open court, the taking of 3800 pages of transcript of testimony, and the submission of over 600 exhibits, the District Court for the Middle District of Tennessee on November 22, 1966, filed a lengthy opinion, noting that the court would shortly also enter "detailed findings of fact and conclusions of law, to implement and supplement this opinion." (Opinion, R. 108) On December 16, 1966, the District Court entered its Judgment, dismissing the Complaint. (R. 164) The Judgment recited that the Opinion and the Findings of Fact and Conclusions of Law "shall be taken and considered together as constituting the Court's findings of fact and conclusions of law in this action." (R. 164) Accompanying the Judgment were lengthy and detailed findings of fact, amounting to 302 in all, and 12 conclusions of law. (R. 109-163)

The Decision of the District Court

The case was, of course, tried and decided before this Court's decision in *United States* v. *First City National Bank of Houston, supra.* At the time of trial the law was still unsettled as to the relationship between the administrative findings of the federal regulatory authority with jurisdiction to approve or disapprove a bank merger (here,

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that one of its purposes is: "to establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks. . . ."

the Comptroller of the Currency), and the function of a Federal district court in a subsequent antitrust suit attacking the merger. Accordingly, on the material points in controversy, the District Court applied alternative review standards, both affirming the conclusions of the Comptroller as supported by substantial evidence,[4] and entering its own findings with respect thereto on the basis of an examination *de novo*. On each material point, the District Court and the Comptroller reached the same conclusion.

The District Court ruled alternatively—on both a "substantial evidence" basis and on its *de novo* examination—as to two questions: (1) whether, apart from the "convenience and needs" clause of the Bank Merger Act of 1966, the merger would have been unlawful—that is, whether its effect "in any section of the country may be substantially to lessen competition;" and (2) whether "the competitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." § 18 (c)(5)(B) of the FDIC Act, as amended by the 1966 Act, 12 U.S.C. § 1828(c)(5)(B).

Thus, on the ultimate question of the instant merger's legality the court made its own *de novo*, independent find-

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[4] While the Comptroller had not formally made findings of the nature specified in the 1966 legislation, his approval of the merger having occurred prior to that legislation, the District Court received the Comptroller's written expressions, as a party to the action, and his testimony in open court on direct and cross-examination at the trial of the action—which expressions and testimony were in the terms provided for in the 1966 amendment—as tantamount to administrative findings. Since the legislation itself does not require formal findings by the Comptroller after a hearing in the customary sense (*see United States* v. *First City National Bank of Houston*, *supra*, at 368), this approach of the District Court appears to be both practical and clearly correct. It has not been challenged on this appeal.

ings and conclusions. This is in accord with the *Houston* decision, *supra,* and with the interpretation of the Act advocated by the government on this appeal which appellee banks do not challenge.

With respect to the question whether this merger violated the competitive standard set forth in the Act, the court fully reviewed all the relevant facts. It considered the statistics as to market structure and as to market concentration urged by the Government, and made extensive findings with respect thereto. (*E.g.,* Fdgs. 19, 21, 25, 56-67, 74, 81-83, R. 113, 114, 118-19, 123, 124). It considered the facts urged by appellees concerning the competition afforded banks by other financial institutions (*E.g.,* Fdgs. 41-43, 46-54, R. 116, 117-18), rejecting appellees' contention that such competition was directly relevant to the alleged anticompetitive effects of the merger. It also received and considered evidence on the geographic area in which banks and other financial institutions competed for business (*E.g.,* Fdgs. 26-36, R. 114-15), also rejecting appellees' contentions that this area was larger than merely the county in which branch banking was permitted under State law.[5] Finally, it reviewed postmerger evidence showing

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[5] The District Court's rulings on these issues were contained in the following footnote to its opinion:

> The Court rejects the defendants' and intervenor's argument that in assessing the anticompetitive effects of the merger the relevant geographic market is the broad area served by Third National's correspondent banking system. There is no significant legislative history to support the view that the 1966 Amendment was intended to change the relevant geographic market concept as developed in antitrust law. The Court is of the opinion under the facts of this case that the relevant geographic market is Davidson County. This is 'where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.' *United States* v. *Philadelphia National Bank, supra,* at 357. Also, on the clear preponderance of the evidence in this case the appropriate 'line

the considerably improved service to the Davidson County area actually brought about through the merged operation. (Fdgs. 196-97, R. 141-42)

This evidence confirmed Trust Co.'s rejuvenation by the merger as a viable, aggressive competitor, through the installation of modern equipment, efficient procedures and well-paid, ~~well~~-supervised management. (Fdgs. 138-39, R. 133) The quality of service offered by Trust Co., operating as a branch of Third National, was greatly improved (Fdg. 190, R. 140; Fdg. 192, R. 141); many new and valuable services were made available to Trust Co.'s customers. (Fdgs. 196-97, R. 141-42) Third National's legal loan limit was increased by 20% (Fdg. 113, R. 129), and Trust Co.'s disproportionately heavy portion of assets tied up in mortgages, government bonds and classified loans was reduced to a more appropriate level, thereby freeing funds to finance commerce and industry in the community. (Fdg. 109, R. 128; Fdgs. 168-69, R. 137-38)

Upon these extensive showings the court ruled that "the Comptroller of the Currency's findings . . . that the merger is not violative of antitrust standards, is supported by the clear preponderance of the evidence in the record." (Opinion, R. 107) The court stated that it was "also of this

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of commerce' by which to appraise the competitive effects of the merger is the cluster of products and services denoted by the term commercial banking. The Court does not agree that the omission of the words 'in any line of commerce' from the 1966 Amendment is indicative of a congressional intent to reject 'commercial banking' as a distinct line of commerce in appraising anticompetitive effects. It cannot be presumed that such an important change in established antitrust law would be made by mere omission. Again, there is really no significant legislative history to support the defendants' and intervenor's position on this point. (Opinion, R. 97-98)

view independently of the Comptroller's findings." (Opinion, R. 107) In its ruling on the anticompetitive effects of the merger, the court made reference to the principles enunciated by this Court in *United States* v. *Columbia Steel Co.,* 334 U.S. 495 (1948). These observations, while apposite in the perspective of the overall opinion of the District Court, are not an essential element of its judgment here under review.

Next, the court, also in the alternative, first, ruled that the Comptroller's findings as to the outweighing of the anticompetitive effects by the "convenience and needs of the community" were supported by the record,[6] and, second, made such a finding as its own judgment. On this question, the Court concluded:

> "The anticompetitive effects of the merger of Third National Bank and Nashville Bank and Trust Company are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Nashville metropolitan area (Davidson County, Tennessee)." (C.L. 11, R. 163)[7]

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[6] The Government makes certain references to the fact that the Federal Reserve Board, the FDIC, and the Antitrust Division rendered unfavorable reports on the merger. (G.B. 3-4) But, of course, under both the 1960 and 1966 Bank Merger Acts, these advisory reports were confined to the single point of the anticompetitive effects of the merger. It was only the Comptroller, and, at the trial of the case, the District Court, who were charged under the 1966 Act with the duty of examining all the factors and coming to an overall judgment on both the competitive factor and the community convenience and needs, as demanded by the statute. In addition, the Comptroller had received favorable reports on the merger's overall effects from the Regional Comptroller of the Currency and from the Superintendent of Banks for the State of Tennessee.. (Fdgs. 293-301, R. 155-59)

[7] The merging banks here undertook and bore the burden of showing that the convenience and needs of the community outweighed

The Findings on the Convenience and Needs Issue

The findings of the court revealed the following picture with respect to Trust Co.

Trust Co. was originally purely a trust institution. It was only in comparatively recent years that commercial banking activities were at all emphasized, and it was not until 1956 that the institution's name was changed from The Nashville Trust Company to reflect its banking operations. (Fdgs. 10-11, R. 111) At a (statement) call date immediately prior to the merger, Trust Co.'s capital structure was only $4,361,840. (Fdg. 10, R. 111)

In 1956, Mr. W. S. Hackworth, a popular and well-connected man of 60 with a successful career as a railroad executive already behind him, became president of Trust Co. (Fdg. 115, R. 129) In the late 1950's, under Mr. Hackworth's direction, Trust Co. expanded its commercial banking business, primarily "due to the formidable influence and personal business connections" of Hackworth and of H. G. Hill, Jr., the Chairman of the Board of Trust Co. and President of its controlling stockholder, the H. G. Hill Co., a grocery chain prominent in the area. (Opinion, R. 101) However, by the 1960's, the commercial business which Hackworth's and Hill's contacts could bring in had been substantially exhausted (Opinion, R. 101; Fdg. 233, R. 147), and Trust Co. had reached a "plateau" on which it was "stagnant and floundering." (Fdg. 134, R. 132)

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the anticompetitive effects, as required by this Court's decision in *United States* v. *First City National Bank of Houston, supra.* The District Court, while obviously giving substantial weight to the Comptroller's testimony, did not give it presumptive validity, but considered it, rather, the testimony of an expert witness. The court also refused to allow appellees' counsel to cross-examine the Government's witnesses on the convenience and needs issue; all the proof on this was supplied by appellees' witnesses.

In the four years from June 30, 1960 to June 30, 1964 (immediately prior to the merger) the community's growth increased, as did that of the other Nashville banks. (Fdgs. 225-29, R. 146) On the other hand, Trust Co.'s rate of growth declined substantially. (*Ibid.*) Its participation in the total banking business in the Nashville area declined from 5.72% to 4.83%, a decline of well over 15%. (Fdg. 134, R. 132) Its demand IPC[8] deposits declined absolutely, it being "the only Nashville bank to show a dollar decrease in this category." (Fdgs. 229-32, R. 146-47)

It was in this period—the early 1960's—that the basic deficiencies of Trust Co. became manifest. By 1964, Hackworth was 68 years of age, and under daily medical attention for an illness which subsequently caused his death. (Fdg. 129, R. 131-32) Superannuation was evident generally in the Board of Directors and departmental heads of Trust Co.; 9 of 13 directors were 65 or older (including 4 over 75), as were 4 of the 6 departmental heads, among whom there had been no change for over 18 years. (R. 697) Apart from the trust department, the average age of the officers was over 60. (Fdgs. 140, 141, 143, R. 133) The salary level at Trust Co. was lower than the average salary at the three major banks in Nashville and, indeed, was lower than that at the four smaller banks in the county. (Fdg. 138, R. 133) Outside of its trust department, Trust Co. had only one officer under 40 who was a college graduate. (Fdg. 143, R. 133)

By the 1960's, a severe deterioration in Trust Co.'s loan portfolio had set in. By the 1962 FDIC examination, its ratio of "classified loans" (substandard, doubtful, and loss loans) to capital structure exceeded 20%, a common bench

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[8] Deposits of individuals, partnerships and corporations.

mark used by regulatory authorities which, if exceeded, normally indicates that corrective action is desirable. (Fdg. 173, R. 138) The average rate of classified loans to all loans of all national banks in Tennessee on the examination closest to the date of the merger was 1.43%; Trust Co.'s ratio of classified loans to all loans was 6.9%, almost five times this average.[9] (Fdg. 271, R. 152) Trust Co.'s officers were not properly servicing their loans. (Fdg. 173, R. 138) The ratio of loan losses was 5.6% immediately prior to the merger (as compared, for example, with Third National's ratio of 1.6%). (Fdg. 174, R. 139) Although Third National's loan volume was more than eight times greater than Trust Co.'s, Trust Co. had more classified loans, by dollar volume, than did Third National at the time of the last examination prior to the merger. (Fdg. 274, R. 153) Although Trust Co. had a relatively broader base for the maintenance of bad debt reserves because of very substantial past losses, its classified loans at the last examination prior to the merger were 145.4% of its reserve for bad debts, as compared with Third National's 17.2%. (Fdg. 275, R. 153) Trust Co.'s classified assets, as a percentage of capital structure, increased from 15% in 1960 to 27% in 1963. (Fdg. 276, R. 153)

As the District Court found, the heart of the commercial banking business is commercial lending, and commercial lending is the reason for the existence of commercial banks. (Fdgs. 283, 286, R. 154-55) Despite this, Trust Co.'s "commercial banking department operated more as a sideline." (Fdg. 286, R. 154-55) Trust Co. had no credit specialists, (Opinion, R. 102) and did not even keep credit files. (Fdg. 111, R. 128-29) Obvious prospects for commercial banking

[9] Third National's was 0.6%. (Fdg. 271, R. 152)

services were unaware that Trust Co. was even engaged in commercial lending. (Fdg. 286, R. 154-55) Not only did Trust Co. have a comparatively low ratio of loans to deposits, but about 40% of its loans were tied up in long-term mortgages, instead of being devoted to commercial loans which support the commerce of a growing community. (Fdgs. 109, 287-90, R. 128, 155)

Trust Co. was also deficient in a number of other material respects. Through disinclination or disability it did not make indirect auto loans through dealers and was thus limited to the making of direct loans. (Fdgs. 252-56, R. 150) Trust Co. was incapable of doing an effective job at correspondent banking (Fdg. 95, R. 126), and did not have a correspondent bank department as such. (*Ibid.*) Thus, it could neither perform correspondent services for other banks and their customers throughout the less urbanized areas of the central South, nor provide correspondent banks connections for its own customers—services that the larger banks in Nashville could perform. (Fdgs. 95, 99, R. 126) As the District Court found, "The Nashville market is such that the failure of a bank located in the area to engage in correspondent banking demonstrates a lack of determination to do its job." (Fdg. 101, R. 127) As the District Court also observed, "A failure to compete in this area places a bank at a distinct disadvantage." (Fdgs. 101-02, R. 127) Banks of Trust Co.'s size in its general area could, as a practical matter, if they had the management skills, engage satisfactorily in correspondent banking. (Fdg. 104, R. 127)

One of Trust Co.'s greatest handicaps was its lack of branch banking facilities, "which are essential to efficient competition." (Fdg. 176, R. 139) It had only one small branch, and even smaller banks passed it by in this respect.

(Opinion, R. 103) Trust Co. had found it difficult to catch up. (Fdg. 182, R. 139-40) The principal reason for this difficulty was that it lacked "the necessary capable personnel to staff branches." (Fdg. 297, R. 157)

The District Court also found that Trust Co. was deficient in areas related to the attraction of consumer deposits, such as special checking account facilities and the provision of mobile home financing. (Fdg. 111, R. 128-29) Moreover, bookkeeping and accounting procedures were inadequate and obsolete and physical plant was wearing out. (Fdgs. 179-80, R. 139)

Trust Co.'s system of internal controls was weak. It had an ineffective audit program. An audit program is essential when a bank reaches Trust Co.'s size, and all national banks in the region of comparable size had continuous and effective programs. (Fdg. 93, R. 126) Indeed, in the late stages, before the merger, controls over the trust department, the oldest and most established facility of Trust Co., were breaking down. The 1962 FDIC report noted that the vice-president in charge of the trust department was remiss in improving functional procedures necessary for prudent operation. He was criticized for exercising little control over junior officers. Necessary reforms promised the examiners were not carried out. (Fdg. 154, R. 135) On certain occasions, Trust Co., as trustee, acquiesced in violations of law, and the trust department's ability to make corrections in response to examination criticism was disappointing. (Fdgs. 158-60, R. 136)

In summary, in the last four years of its separate operation, the basic structural and organizational problems of Trust Co. had caught up with it. Its president "had about exhausted the area from which he could obtain busi-

ness." (Fdg. 233, R. 147) His active business life was coming to a close. He had come "very close to being an indispensable person" to Trust Co. (Fdg. 115, R. 129), and his passage from the scene was imminent. Meanwhile, Trust Co. was not growing apace with the Nashville economy. During the four years immediately prior to the merger, its growth rate had decreased 55% and its share of market 15%; every other Nashville bank showed an increase in both categories. (Fdgs. 134, 225, R. 132, 146)

In November, 1963, Mr. William C. Weaver, Vice President of a Nashville-based life insurance company, began negotiations with Messrs. Hill and Hackworth for the purchase of the H. G. Hill Co.'s controlling interest in Trust Co. by a group of local businessmen headed by Mr. Weaver. (Fdg. 117, R. 129-30) On January 14, 1964, Weaver and associates purchased the controlling stock of Trust Co. from Hill and Hackworth as a long term investment, with no intention of becoming active in its management. (Fdgs. 118-19, R. 130)

Soon after the Weaver group purchased control of Trust Co., officials of Commerce Union Bank expressed an interest in acquiring the stock of this group. Mr. Weaver expressed no interest in a sale, on the grounds that Trust Co. had been bought with an intention to operate it (R. 495), not sell it. (Fdgs. 119-120, R. 130; R. 38; R. 490)

At this same time, raiding attempts on customers and key employees by Trust Co.'s larger competitors were taking place, and the morale of Trust Co. employees was being adversely affected. (Fdg. 127, R. 83) The Hill interests had sold out, and 30% of the deposits had been attributable to them. (Fdg. 116, R. 81) It was a period of general uncertainty and "imminent deterioration."

(Opinion, R. 108) Mr. Primm, one of the "practically irreplaceable" (Opinion, R. 101) senior officers of Trust Co. and its only officer who devoted his time primarily to the solicitation of commercial accounts, was hired away by one of the large competitors of Trust Co., taking very substantial deposits and loan accounts with him to his new connection. (Fdg. 126, R. 131) Trust Co. became a "sitting duck" for other banks. (Fdg. 194, R. 141) The problems were "almost insoluble . . . unless resort was had to a merger." (Fdg. 131, R. 132)

With each passing day the Weaver group had become better acquainted with the facts as to Trust Co.'s moribund condition and with all its manifold problems whose seriousness they had not previously recognized. (Fdg. 182, R. 139-40; R. 37-38; R. 493-95) After many inquiries by Weaver and his associates and efforts to find improved management or otherwise solve these problems, the Weaver group decided that merger was the best method of fulfilling their responsibilities to the community, to bank employees, and to other stockholders; that in fact, a merger was a business necessity. (Fdgs. 183-84, R. 537-39)

Mr. Fleming, Third National's President, had approached Mr. Weaver, first to discuss purchase and then offering to buy the Trust Co. stock held by the Weaver group. (R. 496-97; Fdg. 121, R. 130) On March 11, 1964, Messrs. Weaver and Fleming reached agreement for Third National to purchase the Weaver stock in Trust Co., and the Boards of Directors of each bank approved the merger on March 12. (Fdg. 123, R. 130-31)

As to the overall effects of the merger upon the convenience and needs of the Nashville community, the District Court found that the need for capital in the Southern

region and in the Nashville community is great, and that the region had been and must continue to be an importer of capital for a long time, its economy needing financial institutions with larger resources to support its growth potential. (Fdgs. 68-72, R. 122-23) The lower lending limits of the Nashville banks had caused home industries in the area to look to other areas for banks to supply their credit needs. (Fdg. 73, R. 123) Due to the absence of larger financial institutions, the whole region of Tennessee, northern Alabama, and southern Kentucky is a capital deficit area, and the capital inadequacies of local financial institutions in the area cause an inability on their part to act as lead or primary sources for credit. This, in turn, often prevents local banks from being established as the primary bank connection for local industries, and sends interest payments out of the local area. (Fdgs. 202-06, 210, R. 143; R. 775) The merger strengthened Third National and increased its loan limit. (Fdg. 113, R. 129)

The southeastern United States is one of the fastest growing areas of the country. Cities in that area, comparable in size and population to Nashville, have accordingly tended to have similar or greater concentrations in commercial banking. Thus, taking the deposits of the three largest banks in each metropolitan area, in Chattanooga there is a 100% concentration; in Mobile, 98%; in Birmingham, 93%; and in Memphis, 92%. (Fdg. 83, R. 124; Opinion, R. 105)

Reviewing all the factors, the court concluded that the merger's anticompetitive effects were clearly outweighed by the affirmative benefits to the convenience and needs of the community afforded by the merger. (Opinion, R. 108; Fdg. 195, R. 141; C.L. 11, R. 163)

SUMMARY OF ARGUMENT

1. The District Court's voluminous findings of fact and conclusions of law clearly indicate that the court made a *de novo* investigation of the material issues, and its own *de novo* findings both as to the merger's anticompetitive effects and as to the merger's services to community convenience and needs. The court's ultimate judgment was a finding that "as shown by the decided preponderance of the evidence, the merger . . . clearly serves and meets the convenience and needs of the Davidson County, Tennessee area, and such convenience and needs clearly outweigh in the public interest any anticompetitive effects of the merger (Fdg. 195; R. 141). This ultimate judgment was "the court's judgment."[10]

2. The District Court's ultimate finding concerning the outweighing of anticompetitive effects by community convenience and needs is a complete support for its judgment.

(a) There is no merit to the Government's argument (G.B. 16) that the District Court assessed the anticompetitive effects of the merger by an inappropriate standard and that its judgment is thus "fatally undermined." In evaluating anticompetitive effects of the merger, the District Court took into account the statistical information, including postmerger data, urged by the Government as the touchstone of the assessment of anticompetitive effects;

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[10] *See United States* v. *First City National Bank of Houston, supra,* at 369.

indeed, the court concluded that the Government had made out an "arguable case" in this respect. However, the court, as required by the Act of 1966, also assessed the manner in which the merger would serve the convenience and needs of the community, thus giving specific attention to the precise statutory test. So long as the District Court took all the relevant facts bearing on competition into account in making a factual balancing of the convenience and needs of the community against the anticompetitive effects, it is without significance whether or not the court drew the unnecessary further legal conclusion that, apart from the convenience and needs exception, the merger would have violated the Act.

(b) In assessing the probable effect of the merger in meeting the convenience and needs of the community to be served, the District Court properly considered certain relevant portions of the legislative history of the Act of 1966, particularly the portion of the House Report dealing with "the floundering bank problem in medium to smaller sized communities." (H.Rep. No. 1221, 89th Cong., 2d Sess., p. 3) It concluded that at the time of the merger Trust Co. had reached a point of "imminent deterioration", (Opinion, R. 108) and that a solution to Trust Co.'s problems by merger was a "business necessity." (Fdg. 184, R. 140) The court made extensive findings with respect to Trust Co.'s specific deficiencies, and with respect to the specific means whereby the merger would serve significant community needs. None of the allegations in the Government's brief (G.B. 9) concerning the premerger, competitive services rendered by Trust Co. is supported by the facts adduced on the record; in fact, the lack of substance in these allegations demonstrates the degree to

which the Government is forced to go behind the District Court's findings of fact in attempting to minimize Trust Co.'s serious problems.

3. The Government's next contention—that the District Court erred in concluding that appellee banks had successfully established the community convenience and needs defense—is also without merit. The basis of this contention is that the benefits of the merger could have been obtained through solutions to Trust Co.'s problems other than the instant merger. This argument, we submit, is both erroneous as a matter of law and unsupported by the facts of record.

(a) There is nothing in the statutory text or legislative history which requires—or even suggests—theoretical speculation into alternative means of promoting the convenience and needs of the community. The "failing company" defense, recognized in orthodox Clayton Act § 7 cases where there is no convenience and needs defense, is based upon the theory that the elimination of a failing company by merger will not lessen competition since the failing company would in any event disappear as a competitive factor, merger or not. The exception to this defense is proof of the existence of an alternative purchaser ready, willing and able to acquire the failing company with less resultant anticompetitive effects. So, also, the inference that an acquired company would disappear as a competitive factor cannot be drawn where the proof shows a likelihood of the survival, without merger, of the allegedly failing company.

We submit, however, that the entire rationale for the alternative purchaser exception under the failing company defense is inapplicable here. In bank merger cases, where

there is a statutory defense based on service to community convenience and needs, the overriding question is not whether a given merger is likely to diminish competition. The convenience and needs defense assumes not only that an acquisition may indeed be anticompetitive, but that, notwithstanding impairment of competition, the promotion of the community's convenience and needs furnishes justification for the merger. The question is not whether acquisition by some alternative purchaser might have involved *less* impairment of competition or *more* community benefits. The only question is whether the community convenience and needs served by the merger outweigh the adverse effects on competition. Therefore, given this statutory rationale, no requirement should be written into the law to the effect that the proponents of the challenged merger must negate other solutions to the floundering bank's problems.

Practical considerations also indicate the invalidity of the Government's position on the alternative purchaser question. If it were accepted, in virtually every case a number of alternative mergers would have to be analyzed by the agency and the court. Under the Government's theory, the management of a floundering bank would be required to solicit a merger proposal from every bank in the community with which it might, in the light of hindsight, conceivably have been merged. Moreover, the agency and the court, in the case of each bank showing an interest in merger, would have to conduct a comparative hearing into the relevant effects on competition of each alternative merger, and into the quantum by which the community convenience and needs might be served by each. Every bank merger case, under this theory, would thus become virtually a comparative hearing. The possibility of this spectacle is, we suggest, reason enough to reject the Government's contention.

(b) Irrespective of the validity of the foregoing rationale, the record here supports the conclusion of the District Court that no solution for Trust Co.'s problems, other than merger, was feasible. The evidence to support the findings of the District Court in this regard is overwhelming. Thus, the Government's contention that non-merger alternatives existed and were practicable solutions for Trust Co.'s problems is simply an unwarranted belittling of the scope and magnitude of those problems. The fact is that Trust Co. was a classic example of a "floundering bank" in a "medium to smaller sized community" which the framers of the Act of 1966 envisioned as normally having to use merger as the only feasible solution to its problems. Indeed, in view of the public service nature of the banking industry, the "exit" of inefficient competitors by the merger route is, as a matter of public policy, highly preferable to failure or voluntary liquidation.

The only specific alternative solution to Trust Co.'s problems advanced by the Government is a merger with Commerce Union Bank which, like Third National, is one of the "big three" banks in Nashville. The suggestion of this merger as a preferable alternative to the instant merger amply demonstrates the essential weakness of the Government's position. A merger of Trust Co. and Commerce Union would have itself combined 26% of the banking assets, deposits and loans in the area, and over 35% of the total banking offices located there. More importantly, it would have had precisely the same effect on the degree of concentration in the hands of the "big three" banks in the county as did the merger which actually took place.

(c) In addition to the deficiencies of this purely statistical approach to the serious business of antitrust enforcement, and the escalation of this approach to an extent not

previously contemplated, it is impossible to say which merger would have been the more anticompetitive without an exhaustive, comparative analysis. Moreover, even if it is assumed that the merger with Commerce Union would have been somewhat less anticompetitive, it does not follow that such a merger would be a preferable alternative. The basic point of the Act of 1966 is to require the District Court to weigh community convenience and needs against anticompetitive effects. The District Court would, therefore, be required to undertake—on a *de novo* basis—an additional exhaustive, comparative analysis of such a merger's service to convenience and needs, the result of which might well be that a merger of Trust Co. with Commerce Union was not as promotive of community convenience and needs as was its merger with Third National. Even if the statute were construed as requiring such an extraordinary procedure, such an analysis at this time would be an idle gesture inasmuch as there is no evidence to indicate that such a solution remains as a practical possibility. To require this, as would the Government in this case, would be to excise from the law the basic element of the 1966 Amendment—the convenience and needs defense. This, of course, would seriously misconstrue the law, and constitute a totally unwarranted result.

ARGUMENT

1. THE DISTRICT COURT MADE FINDINGS ON THE MATERIAL ISSUES IN THE CASE ON THE BASIS OF THE PROPER STANDARD OF *DE NOVO* REVIEW OF THE COMPTROLLER'S RULING.

The first contention of the Government is that the District Court did not—as required by this Court's decision in *United States* v. *First City National Bank of Houston*, 386 U.S. 361 (1967)—make its own independent findings,

based on a trial *de novo,* on the material issues in the lawsuit. (G.B. 14-15) While this contention was stressed in the Government's jurisdictional statement (pp. 11-12, 19), it is deemphasized by the Government now, (G.B. 15) and, in view of its lack of merit, with good reason. The fact is that the District Court's voluminous findings of fact and conclusions of law bear ample witness to the effect that (at least alternatively to a "substantial evidence" review) the court made a *de novo* investigation of the issues and made its own findings *de novo.* As we have set forth in the Statement, pp. 5-8, *supra,* the alternative nature of the ultimate findings of the District Court on both the competitive standard issue and the convenience and needs issue is plain. See Fdg. 195, R. 141; and *compare* C.L. 11 *with* C.L. 12, R. 163.

Thus, on the question of violation of the competitive standard, the court concluded that, as to the absence of a violation, it was "also of this view independently of the Comptroller's findings." (Opinion, R. 107) As to the convenience and needs exception, the court likewise made alternative findings on the basis of a conventional review and on the basis of an independent examination. (C.L. 11, 12, R. 163) The ultimate finding of fact was the District Court's own finding; the judgment was "the court's judgment."[11] The finding was that:

> As shown by the decided preponderance of the evidence, the merger of Nashville Bank and Trust Company into Third National Bank clearly serves and meets the convenience and needs of Davidson County, Tennessee area, and such convenience and needs clearly outweigh in the public interest any anticompetitive effects of the merger. (Fdg. 195, R. 141)

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[11] *United States* v. *First City National Bank of Houston, supra,* at 369.

The District Court's subsidiary findings cover 53 printed pages. (R. 109-162) With rare exceptions, these are all stated as the District Court's own findings, and are made in the same way as any findings of fact in a civil action tried without a jury would be made.[12]

In the light of these voluminous *de novo* findings by the District Court, we submit that it is impossible to reach any conclusion other than that, along with its holding that the Comptroller's rulings were supportable on the record, the court also ruled on the substantive issues as a matter of its own judgment. Although the court's opinion, rendered prior to this Court's decision in *United States* v. *First City National Bank of Houston, supra,* indicates a preference, with respect to the convenience and needs issue, for the conventional administrative review standard (Opinion, R. 91), it is completely clear from the court's findings and conclusions that—as indeed the dictates of sound judicial administration at the time required—it also, on an alternative basis, reached and expressed its own judgment.[13]

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[12] These exceptions are Fdg. 201 (R. 143), Fdgs. 293-94 (R. 155-56) and Fdgs. 296-302 (R. 156-62). It is interesting to note that even as to its upholding of the Comptroller's findings, the District Court ruled not simply that the findings were supported by substantial evidence but that they were supported by the preponderance of the evidence introduced in the trial of the action in court. *See, e.g.,* Fdg. 302 (R. 161-62); C.L. 12, R. 163. This emphasizes the District Court's own independent finding, on the preponderance of the evidence before it, respecting the matters in issue. Congressman Patman's views in the legislative history of the Act were to the effect that a district court's findings, particularly on the convenience and needs issue, were to be made on the basis of "the preponderance of the evidence" introduced in the action. 112 Cong. Rec. 2441-42, as quoted in *United States* v. *First City National Bank of Houston, supra,* at 366.

[13] This is now practically conceded by the Government. (G.B. 15)

2. WHETHER OR NOT THE DISTRICT COURT'S RULING AS TO THE ISSUE OF VIOLATION OF THE COMPETITIVE STANDARD IS CORRECT, THE DISTRICT COURT PROPERLY FOUND, ON AMPLE EVIDENCE, THAT THE CONVENIENCE AND NEEDS DEFENSE WAS ESTABLISHED, AND THIS IS A COMPLETE SUPPORT FOR ITS JUDGMENT.

There is no merit to the Government's argument (G.B. 16) that the District Court judged the anticompetitive effects of the merger by an inappropriate standard and that its judgment is thus "fatally undermined" and must be reversed.

The District Court made its ultimate findings as to the merger's legality on the basis of extensive subsidiary findings of fact relating both to anticompetitive effects and to community convenience and needs, thus giving specific attention to the precise test specified in the Act of 1966. This test—once the community convenience and needs justification is raised—is not whether the merger would have violated the antitrust laws apart from the convenience and needs exception, nor whether the acquired bank falls neatly into some colloquial category such as "floundering" or "stagnating". The test is whether, on all of the proofs, the probable effects of the merger in meeting the convenience and needs of the community to be served clearly outweigh its anticompetitive effects. So long as the District Court took all the relevant facts bearing on competition into account in making a factual balancing of the convenience and needs of the community against the anticompetitive effects, it is without significance whether or not the District Court drew the unnecessary further legal conclusion that, apart from the convenience and needs exception, the merger would have violated the Act. *Cf. Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154, 156-57 (1965).

(a) *The District Court's analysis of the anticompetitive effects of the merger.*

There is no question but that in evaluating the anticompetitive effects of the merger, and balancing against them the convenience and needs factors, the District Court took into account the statistical information—stressing market percentages, concentration ratios, and percentage increase in concentration—which the Government urges as the touchstone of the question of violation of the competitive standard. See Opinion, R. 98-99; Fdg. 19, R. 113; Fdgs. 20-54, R. 113-18; Fdg. 66, R. 121-22; Fdg. 212, R. 144; Fdgs. 217-19, R. 144-45. The District Court also went beyond an examination of market structure to look at the realities of the competitive situation "on the basis of . . . an individual examination" of Trust Co. (H.R. Rep. No. 1221, 89th Cong., 2d Sess. (1966), p. 3).

Among the matters examined by the court other than market structure were the relationship of branch banking and correspondent banking to the competition existing in the Davidson County area. This examination indicated that Trust Co. was seriously limited as a competitive factor in the market by its having only one branch (Fdgs. 176-78, R. 139) and by its failure to engage in correspondent banking (Fdgs. 95, 97-102, 104, R. 126-27). The court also considered the varying capabilities of the Davidson County banks to handle various types of specialized loans. In this connection, it considered the failure of Trust Co. to make indirect automobile loans, and its unduly heavy investment in long term real estate loans, a field in which Third National did very little business, as additional factors tending to result in less competition between the two institutions than market statistics alone might indicate. (Fdgs. 111, 253, R. 128, 150; Fdgs. 168-69, R. 137-38) The court also

considered the fact that Trust Co. had been a substantial customer of Third National's (as well as of the other major banks in the area) prior to the merger, and that this factor further decreased the competition between the two. (Fdgs. 236, 244-46, R. 147-49; R. 433-36) An additional fact considered by the court was that 30% of Trust Co.'s business had been attributable to the H. G. Hill family, controlling stockholders of Trust Co. through the H. G. Hill Co., which family sold out prior to the merger. (Fdg. 194, R. 141) Finally, the court considered the overall seriousness of Trust Co's condition as bearing on the degree to which Trust Co. could compete effectively in the Davidson County area. (R. 108)[14]

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[14] The District Court also noted the fact that Davidson County was part of a capital deficit area, and its need for imported capital from larger banks outside the area. (Fdgs. 202-11, R. 143-44) The District Court also considered the competition received by banks in Davidson County from other financial institutions and, as pointed out above at n. 5 herein, rejected appellees' arguments concerning the appropriateness of expanded geographic and product markets in cases of this kind. However, the Government's statement (G.B. 21), that appellees have not challenged the District Court's finding that commercial banking was the appropriate line of commerce, and that no question concerning "line of commerce" arises here, is incorrect. We submit that the omission of the words "in any line of commerce" from the Act of 1966 was intended to require, in assessing the anticompetitive effects of a bank merger, an expanded factual inquiry into the impact, in the community to be served, of the competition rendered by other financial institutions, both within and outside of that community. We further submit, however, that it is not necessary for the Court to reach that question in order to affirm the District Court in the case at bar. The Comptroller of the Currency will brief and argue this question, and appellee banks will rely on that brief and argument to bring the matter properly to the attention of this Court.

Appellee banks did not file notice of, and perfect, a cross-appeal on this question, or mention it in their Motion to Affirm, but may nevertheless assert and rely upon this as an additional reason for the affirmance of the lower court's opinion. *United States* v. *Raines*, 362 U.S. 17 (1960); *United States* v. *American Railway Express Co.*, 265 U.S. 425 (1924).

Still another factor considered by the trial court in assessing the merger's anticompetitive effects was the absence of a history of mergers, on the part of both Third National and Trust Co., and in the market in general. Third National had never before in its 37 year history entered into a merger transaction with another bank, and Trust Co. had not been involved in a merger for "over 20" years. (R. 752)[15]

In this connection, the reference in the Government's brief to *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966), is inapposite. To be sure, *Pabst* condemned "a steady trend towards concentration" and observed that Congress was "concerned with arresting concentration, whatever its cause." This does not mean, however, as contended by the Government, that the absence of a merger history is irrelevant. *Pabst* stands only for the proposition that the presence or absence of a trend toward concentration is relevant, whatever the cause of that trend. *Cf.* *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966). But here, there was no such trend of any kind, from any cause.

Finally, the District Court also had the benefit of post-merger evidence concerning the effect of the merger on competition in the Davidson County area during the two years that elapsed between the merger and the trial. For example, the court found that in spite of Third National's increased efforts (R. 761), its share of the market declined between the time of the merger and the trial, and that some sixteen months after the merger Third National was again second in size in the community. (Fdg. 67, R. 122; Fdg. 87, R. 125) As this Court has noted, such evidence is

[15] As shown in the pleadings (R. 10) the actual date of Trust Co.'s prior merger was 1933.

admissible on this question. *FTC* v. *Consolidated Foods, Inc.,* 380 U.S. 592, 598 (1965).

Evaluating all of these factors the District Court made it quite plain that, purely under the competitive test of § 7 of the Clayton Act, there might well have been a violation. The court said:

> The plaintiff has established an arguable case for condemnation of the merger under the pre-1966 standards of the *Lexington, Philadelphia,* and other cases treating Davidson County as the relevant geographic market and commercial banking as the services or products market . . . . (Opinion, R. 97)[16]

[16] It is interesting to note that in the *Philadelphia* case, here cited by the lower court, this Court indicated that the economic viability of the merging banks was related to the effectiveness of the competition which the merger would eliminate. The Court thus noted in *Philadelphia* that both the acquired and acquiring banks were "healthy and strong"; that they were not "under-capitalized or over-loaned"; and that they had "no management problems." 374 U.S. at 371. The Court also examined the localized nature of most banking services and the branching activities of the merging banks, stating that ". . . in banking, as in most service industries, convenience of location is essential to effective competition." 374 U.S. at 358. While *Philadelphia* also emphasized the desirability of simplifying the proof in merger cases as much as possible, in order to expedite the judicial process and to furnish understandable guidelines on which the business community may base intelligent decisions, it also clearly left the door open for an examination of relevant market factors.

It thus reaffirmed, for purposes of testing anticompetitive effects in bank merger cases, the approach established by *United States* v. *Brown Shoe Company,* 370 U.S. 294 (1962), which stated:

> Statistics reflecting the shares of the market controlled by industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effects of the merger. 370 U.S. at 322, n. 38.

This test was followed by the District Court in the instant case.

Thus, the District Court's observations as to the legal standard to be applied in examining the question whether, apart from the convenience and needs factors, a violation of the competitive standard would have been proved,[17]

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[17] In any event, it does not appear that the District Court's remarks concerning the *Columbia Steel* case were designed to indicate its belief that the 1966 legislation altered the competitive standard to be applied in bank merger cases. If the lower court's opinion is read as a whole, it is clear that these observations relate to both points which must be investigated under the 1966 Act—the competitive aspect and the community convenience and needs. The point of the District Court's observations is simply that it construed the Act of 1966 as embodying, in its totality, the "rule of reason" approach to bank mergers. The District Court's opinion observed:

> . . . Essentially what the 1966 Amendment does is to change this ultimate test of validity from one depending strictly upon antitrust laws to a test balancing antitrust considerations with the special factors recognized by Congress as peculiarly applicable to the banking industry. (Opinion, R. 93)

That the court was correct in this construction was confirmed by this Court in the *Houston* case, *supra*. *See* 386 U.S. at 363-64, 369-70. The District Court's reference to the factors enumerated in *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948) does not vitiate the court's judgment in this respect. The District Court's opinion clearly stated that its reference to *Columbia Steel* was to recognize that:

> . . . [T]he fundamental purpose and effect of the 1966 Amendment [is to provide] that the anticompetitive effects may be outweighed in the public interest by the convenience and needs of the community, and that consideration shall be given in every case to the qualitative banking factors specifically enumerated. (Opinion, R. 96)

The court then went on to say:

> These factors ["qualitative banking factors" relating to convenience and needs] are sufficiently comprehensive in character not only to embrace the *Columbia Steel* criteria but also to require an even broader scope of inquiry and analysis with respect to antitrust issues. (Opinion, R. 96)

A reading of the Act of 1966 and its legislative history sustains this view; *Houston* confirmed it. The "broader scope" includes a concurrent weighing of community needs and interests.

In light of this, the trial court's reference to *Columbia Steel*, properly construed, was not related solely to anticompetitive effects. The thrust of the reference was simply to state the court's conclusion

did not affect its ruling on the convenience and needs justification as an adequate basis for its judgment. As a matter of factual analysis, the District Court weighed in proper perspective, under this Court's teachings in the principal recent cases involving Section 7 of the Clayton Act, all the record facts concerning the merger's impact on competition.

(b) ***The District Court's analysis of the convenience and needs of the community to be promoted by the merger.***

(i) **Trust Co.'s serious operating deficiencies had caused it to be in a state of "imminent deterioration" prior to the merger.**

On the basis of a host of subsidiary findings (see Statement, *supra*), the District Court reached the following conclusions as to the condition of Trust Co. immediately before the merger:

> The Trust Company had simply reached a period of imminent deterioration. It was at the time of the merger a "floundering" bank, though not a failing one. It was no longer capable under its existing ownership and management, and with its existing facilities, procedures, and attitudes to serve the public on a competitive basis with other banks in the market area. It was more attuned to the Victorian Age which gave

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that the Act of 1966, by requiring consideration of both anticompetitive effects and benefits in service to community convenience and needs, embodied a "rule of reason" approach "long prevalent in the antitrust field." *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918). *See also, Houston, supra,* at 369. This is but another way of saying that, while evidence concerning anticompetitive effects and convenience and needs benefits, and the burden of proof with respect thereto, may be procedurally divided between the plaintiff and defendants, such conceptual pigeon-holing for purposes of overall evaluation is neither required nor helpful. Indeed, such categorization is virtually impossible in the mental processes required for judgment here.

it birth than to the competitive realities of 20th Century commercial banking. (Opinion, R. 108)

On the basis of this and its other findings, the District Court independently made the following ultimate finding:

> As shown by the *decided preponderance of the evidence,* the merger of Nashville Bank and Trust Company into Third National Bank clearly serves and meets the convenience and needs of Davidson County, Tennessee area, and such convenience and needs clearly outweigh in the public interest any anticompetitive effects of the merger. (Fdg. 195, R. 141) (Emphasis supplied)

The validity of this ultimate conclusion by the District Court is sustained by Act of 1966's clear mandate to look beyond anticompetitive effects to convenience and needs, and the court's correct application of this new test to the proof developed on the record.

With respect to the Act's legislative history this Court in the *Houston* case, *supra,* noted:

> . . . [T]he 1966 Act was the product of powerful contending forces, each of which in the aftermath claimed more of a victory than it deserved, leaving the controversy that finally abated in Congress to be finally resolved in the Courts." 386 U.S. at 367.

This is not to say, however, that helpful guidance on certain provisions of the Act may not be found.[18] For ex-

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[18] As pointed out in *Crocker-Anglo, supra,* at 2274, in reviewing the legislative history of the Act, it is reasonable to give more weight to the views of those legislators who actively supported the legislation than those who fundamentally opposed its basic goal of modifying then existing law.

ample, it seems clear from the legislative history that the Congress intended to recognize the problem of banks which, for one reason or another, are unable to compete effectively and which may be in danger of sliding downhill to a dangerous degree. Such banks were referred to as "floundering" or "stagnating" banks; their problems were sources of continuing concern to the Congressmen and Senators considering the 1966 legislation. Perhaps the clearest expression of this concern is to be found in the report of the Banking and Currency Committee of the House of Representatives, which made reference to this matter as follows:

"Under general antitrust law criteria, particularly as they have been developed over the past few years, the banking agencies find it difficult to deal as they would like with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, and one or more of these banks appear to be stagnating. It may be because it is below the economic minimum size to attract capable and vigorous management personnel, it may be because it is closely held by owners who insist on unrealistically conservative policies, or it may be for any other reasons which are discernible only by an examination of that particular bank as an individual institution. The banking agencies, with some differences in degree among themselves, have contended that they should be able to consider a merger application on the basis of such an individual examination, and to approve it if they believe that the result would be a more vigorously competing institution, furnishing better overall service to the community, even though the reduction in the num-

ber of competing units, or the concentration in the share of the market in one or more lines of commerce, might result under general antitrust law criteria in a substantial lessening of competition." H. Rep. No. 1221, 89th Cong., 2d Sess. 3 (1966).

In light of this clear Congressional intent, and of the extensive findings by the court below that Trust Co. had reached a point of "imminent deterioration," (Opinion, R. 108) it is submitted that the District Court's judgment was completely sound, and in accord with a primary objective of the Act.

In this connection, we believe it would be helpful to comment briefly on certain allegations in the Government's brief that Trust Co. was actively rendering certain important services in competition with the major banks of the area, and on the Government's claim that the elimination of a separate banking institution providing these services had serious anticompetitive effects. The lack of substance in these allegations and in this claim demonstrates not only the difficulty of finding any truly competitive service being rendered by Trust Co. prior to the merger, but also the extent to which the Government is forced to go behind the District Court's findings of fact on Trust Co.'s condition. These findings resolved, on the preponderance of the evidence, the conflicting views expressed in the testimony.

The Government claims that Trust Co. "competed aggressively for small and medium sized businesses and individual accounts and loans, on occasion making business loans to individuals rejected as marginal risks by the three major banks." (G.B. 9) The fact is that such aggressive-

ness as Trust Co. had demonstrated before the merger ceased with the loss of the three men to whom 80% of Trust Co.'s business had been attributable. (R. 274)

With respect to "business loans to individuals rejected as marginal risks by the three major banks," the Government relies on the testimony of two witnesses. It was developed on cross-examination that one of these had also received numerous loans from, and had not in fact been rejected by, Third National. (Fdgs. 266-67, R. 152) The other witness admitted on cross-examination that when turned down by Third National his existing indebtedness had been double his net worth. (Fdg. 266, R. 152)

The Government further states that Trust Co. "had a well-managed trust department." (G.B. 9) While this may have appeared superficially justified, in reality, as indicated in appellees' Statement, *supra,* at p. 13, Trust Co.'s controls over its trust department were breaking down at the time of the merger, and the head of its trust department had been remiss in making necessary improvements and reforms. Moreover, Trust Co. had been severely criticized by bank examiners for Trust Co.'s acquiescence in violations of law, and its failure to make adequate and timely corrections in response to such criticism. (Fdgs. 152-60, R. 134-36)

The Government also alleges that Trust Co. maintained "generally lower service charges than other banks" with respect to demand accounts. Again to the contrary, as noted by the District Court, "the service charge differential noted by the plaintiff could have affected only 4% of [Trust Co.'s] IPC demand deposits at most . . . , and would be insignificant." (Fdg. 262, R. 151) The court made other findings indicating that Third National made

no charge on medium size personal checking accounts, and that service charges in Nashville generally were among the lowest in southern cities for all types of accounts. (Fdgs. 263-65, R. 151-52)

Finally, the Government states that Trust Co. "specialized in direct loans to the consumer" for automobile purchases, which were "generally cheaper" than indirect loans to consumers through local automobile dealers. (G.B. 9) Though the Government admits that Third National carried twice as many direct automobile loan accounts as Trust Co. (at the same rate charged by Trust Co.), it failed to note the District Court's finding that indirect automobile loans, not provided by Trust Co., constituted an important and beneficial service to the business community and to the consumer, and that Trust Co.'s failure to provide such loans was but another indication of its inability to compete effectively. (Fdgs. 252-56, R. 150)

(ii) The merger of Trust Co. and Third National resulted in substantial positive benefits and service to community convenience and needs.

With respect to the findings as to benefits caused by the merger, in addition to the alleviation of Trust Co.'s condition as a floundering and stagnant institution, the legislative history of the Act is again relevant. It seems clear that Congress intended to modify substantially the overall uniform test by which bank mergers were henceforth to be judged by the courts and the banking regulatory agencies. The goal of the law was not changed—the preservation of a healthy, viable banking system—but the Congress did give recognition to the principle that mat-

ters in addition to anticompetitive effects were to be considered in judging the legality of bank mergers.[19]

The Act provides that among the matters to be considered are "the financial and managerial resources and the future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served." 12 U.S.C. (Supp. II) § 1828(c)5. This language clearly requires an expanded factual inquiry into the "economic needs" of the community to be served, and "banking services" to be rendered in that community as a result of the merger.[20]

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[19] The Report of the House of Representatives (H. Rep. No. 1221, 89th Cong., 2d Sess.) accompanying the Act of 1966 (H.R. 12173) indicates this in several places. For example, it states:

> [This Bill] would require the courts to use *the new standards of the Bill* in all cases instituted under the antitrust laws. . . . (at p. 2) (Emphasis supplied)

This Report states that the purpose of the Bill is to resolve "the disagreements between the Department of Justice and the banking agencies" (at p. 2), and that it had done so by modifying the provisions of "existing law" in three respects. (at p. 3)

Even Congressman Patman, who had stated that he was "against [the law] as a matter of principle" (112 Cong. Rec. 2464), agreed that the law changed existing law by creating a "very limited exception found in (5)(B)." (112 Cong. Rec. 2441)

[20] The following comments by several members of the House of Representatives relate to this point. All were made on February 8, 1966 during the debate on H.R. 12173 (which became the Bank Merger Act of 1966) except where indicated. All are found in 122 Cong. Rec. except where indicated (Emphasis supplied throughout):

> The purpose of paragraph 5 is to set the record straight and make it clear that *banking services* furnishing the very life blood of the economy of any community, stand on a somewhat different footing from other forms of economic activity. Congressman Ashley, at p. 2446.

> A strict interpretation of the antitrust laws might simply perpetuate a substandard financial condition. On the other hand the community would stand to gain significantly since the re-

Conversely, there is nothing in the legislative history cited by the Government (G.B. 32) to support its argument that the words "convenience and needs," whenever they appear in the Act of 1966, include only "new and important" banking services. The House Report[21] states only that the beneficial effects of the merger must be "clearly shown". Congressman Todd's remarks, in fact, prove the contrary; having preceded his remarks with the flat statement that he was "in opposition" to the bill, he then stated his views as to how the convenience and needs test *should have been* limited.[22] His views did not prevail; the bill passed over his opposition. The Government's final reference to the remarks of Senator Robertson, for the same reasons, does not support its contention.[23] It thus seems more reasonable to conclude that the use of the broad term "convenience and needs" was intended to encompass a wide range of services and improvements.

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maining two banks could better serve its *economic needs.* Congressman Widnall, at p. 2442.

It also assures that the *banking services* available to meet the convenience and needs of a community are considered in all cases and will prevail where they clearly outweigh nonmonopolistic anticompetitive effects of a merger. Congressman Ottinger, H.Rep. No. 1221 at p. 39.

[21] H.Rep. No. 1221, 89th Cong., 2d Sess. 3 (1966).

[22] 112 Cong. Rec. 2456-57. Congressman Todd said only "We are talking fundamentally about banking services, which again are defined as they are in Supreme Court decisions and studies of commercial banking made by the staff of the office of the Comptroller of the Currency." This language would seem to permit an examination of banking services as urged by appellees, not necessarily limited to "new and important" services as defined by the Government.

[23] 112 Cong. Rec. 2656. These remarks are contained under the subheading "Monopoly and Competition in Banking," and refer to the legality, under the new Act, of an anticompetitive merger which brings "demonstrable benefits" to the community. It is precisely these kinds of benefits that were proved in the instant case.

As noted by the District Court in the instant case, the merger in fact created many new and improved services to the Nashville community (Fdgs. 196-97, R. 141-42),[24] all

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[24] 196. The merger has especially served the needs and convenience of the Davidson County area in the following very important particulars:

(a) It has entirely solved the serious management and operating problems of Nashville Bank and Trust Company.

(b) The legal lending limit of the resulting bank has been substantially increased, which provides more credit for businesses and employment for people in the community and the region.

(c) Seventeen banking offices are now available to present and future customers of Nashville Bank and Trust Company where only two were available.

(d) A fully automated operation, including two computers, has been made available to customers of Nashville Bank and Trust.

(e) A correspondent banking system covering a wide area of the Central South provides customers of Nashville Bank and Trust with important contacts.

(f) Higher salaries, increased fringe benefits, better working conditions and a funded pension plan are provided for Nashville Bank and Trust personnel and their families.

(g) Special checking accounts and a wide assortment of savings plans are available to customers.

197. The merger also served the convenience and needs of the Davidson County area in these respects:

(a) The Nashville Bank and Trust building on Union Street has been remodeled and made more serviceable for the public.

(b) The Nashville Bank and Trust has received the benefits of membership in the Federal Reserve System.

(c) Greater research facilities, better expertise in trust operations and management in depth have been made available to the trust accounts handled by Nashville Bank and Trust.

(d) Larger capital, surplus, and reserve basis, plus more stable and substantial earnings give better protection to Nashville Bank and Trust depositors and serve as a base to support further expansion.

(e) A small business investment affiliate chartered under the Federal Small Business Act, the first in Tennessee, gives added assistance to the small business customers.

(f) An experienced and extensive credit department will permit more intelligent handling of loan applications and will guard against undue credit losses.

(g) An efficient auditing department will assure better internal operations and give better protection against defalcations.

of which are relevant to the overall public interest. To require defendants to go further and to prove that the merger brought services to the community which did not exist prior to the merger is to require proof either of a negative, or of matters so abstract and speculative as to place before them an insurmountable barrier. Stated differently, the Government suggests that under the statute "new" services must be introduced by a merger to the community at large in order to make out the convenience and needs justification. Obviously, however, the principal effect of many salutary mergers of the sort envisioned by the 1966 legislation would be to make the improved services of the acquiring bank available to the customers of the bank which was acquired. These services would not be "new" in the sense that they would have been unheard of in the community generally, for a bank merger is not some form of business alchemy which creates entirely new services. The point is that the superior services of the acquiring bank in such instances will be made available through the merger to the customers of the bank acquired.

Based on all of the foregoing, we submit that the opinion of the District Court is supported by a solid factual foundation, and that the merger's legality was adjudged in accordance with the principles and objectives of the Act. The merger saved a stagnant bank from further deterioration, and brought many benefits to the community. Such service to community needs and interests was precisely the kind of beneficial service contemplated by the Act, and the District Court's conclusion that it outweighed any anticompetitive effects is supported by substantial evidence and should be affirmed.

3. THE GOVERNMENT'S CONTENTION THAT APPELLEE BANKS WERE REQUIRED TO DEMONSTRATE THAT NO OTHER SOLUTION TO TRUST CO.'S PROBLEMS WAS AVAILABLE IS WITHOUT FOUNDATION.

We have demonstrated in Part 2. above that the District Court's crucial ultimate finding—that the anticompetitive effects of the merger were clearly outweighed in the public interest by the probable effects of the merger in meeting the convenience and needs of the Davidson County area—was fully supported by the record, and is a complete basis for the affirmance of the District Court's judgment, regardless of what view might have been taken of the District Court's observations concerning the question of violation of the competitive standard, standing alone. However, the Government argues (G.B. 25-31) that, in order to make out the "convenience and needs" defense, the appellee banks were required to demonstrate that the benefits to the community's convenience and needs could not have been obtained through a solution to Trust Co.'s problems other than merger, or through an allegedly less anticompetitive merger. We contend that this argument is erroneous as a matter of law, and that, in any event, there is no factual basis for it on the present record.

(a) *The Act of 1966 does not require the appellee banks to negate the existence of alternative solutions to Trust Co.'s serious problems in order to prove the convenience and needs defense.*

The basic premise of the Government's contention is, we submit, erroneous. It is belied by the text of the statute itself, by the absence of support for it in the legislative history, and by the deficiencies of its own rationale.

In the first place, the statute provides that a merger is lawful, even though its effect may be substantially to

lessen competition, if it is found that its anticompetitive effects "are clearly outweighed in the public interest by the probable effect of the [merger] transaction in meeting the convenience and needs of the community to be served." 12 U.S.C. (Supp. II) 1828(c)(5). There is nothing in the statutory text which requires—or even suggests—theoretical speculation into alternative means of promoting the convenience and needs of the community.

The Government points (G.B. 26) to only one item in the extensive legislative history of the Act to indicate that such a further qualification should be read into the defense. Not only is it an isolated and unrepresentative view, but it does not sustain the Government's theory in the case at bar.[25]

The entire basis of the Government's argument appears to be an analogy to the so-called "alternative purchaser" doctrine which is applied with respect to the so-called "failing company" defense in orthdox Clayton Act § 7 cases. (G.B. 26-28) See *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *International Shoe Co.* v. *FTC*, 280 U.S. 291, 302 (1930).

The analogy is false. In an orthodox Clayton Act § 7 case, there is of course no convenience and needs defense. The sole question in those cases is the effect of the merger

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[25] See 112 Cong. Rec. 2445 (remarks of Congressman Reuss). Though Congressman Reuss stated his support for the bill, in several instances he urged interpretations of it clearly contrary to the majority view. *See Crocker-Anglo, supra*, at n.14. In any event, in this single item—which is referred to but not quoted in the Government's brief—Congressman Reuss actually stated only that, in analyzing the convenience and needs of the community, "Consideration would have to be given to whether *purchasers other than a competitive bank, were ready, willing, and able* to acquire the bank with management problems." Of course, no such purchaser is in evidence in the case at bar. (Emphasis supplied)

on competition. The "failing company" defense, which is not explicit in the terms of the Clayton Act, is recognized on the theory that the acquisition of a failing company by a competitor cannot be deemed to lessen competition since in any event the failing company would disappear as a competitive factor, acquisition or not. In applying the "failing company" defense the courts have held that if there is an alternative purchaser available the inference cannot be drawn that the acquired company would disappear as a competitive factor in any event. So, also, the courts have held that this inference cannot be drawn when the likelihood of failure is not shown—that is, if there is shown to be a likelihood of survival of the competitor without the merger. See *International Shoe Co.* v. *FTC*, *supra*, at 302-03; Note, 68 YALE L.J. 1627, 1663 (1959).

But the whole rationale for the "alternative purchaser" doctrine under the "failing company" defense is inapplicable here.[26] Here, where there is a statutory defense based on the convenience and needs of the community to be served, the basic question as to that defense is not, as it is under the "failing company" defense, whether the acquisition in fact is likely to diminish competition. The

[26] In support of this analogy, the Government quotes out of context a single word from this Court's opinion in the *Houston* case. (G.B. 26, 386 U.S. at 360.) The word is "related." In the passage cited, the Court in *Houston*, rebuffing the contention that a *de novo* exploration of the convenience and needs defense before the District Court would impose upon the federal courts performance of duties inconsistent with the accepted role of the federal judiciary, observed that a court's task in determining the availability of the convenience and needs defense often is "related" to its task in determining the availability of the "failing company" defense in an orthodox Clayton Act § 7 case. The Government erroneously seeks to escalate this truism to an indication by this Court that the scope of—and the qualifications upon—the convenience and needs defense in a bank merger case and the "failing company" defense in an orthodox § 7 case, are identical.

convenience and needs defense assumes that an acquisition may be anticompetitive, but it also reflects the judgment of Congress that there are mergers where, notwithstanding impairment of competition, the promotion of the community's convenience and needs furnishes justification. The question is not whether acquisition by some alternative purchaser might have involved less impairment of competition or more community benefits. The only question is whether the promotion of the community convenience and needs flowing from the merger, in the judgment of the agency and the court, clearly outweigh the adverse effects on competition.

Certain factors peculiar to the nature of competition in the banking industry support this conclusion—which, to be sure, is the conclusion which the words of the statute themselves support. Unlike other regulated industries—such as, for example, interstate railroads and airlines—new entry into the banking industry is relatively common. During the period 1962–1966, 1,134 *new* banks were chartered in the United States, such banks constituting over 8% of the number in existence at the start of the period.[27] It is one of the hallmarks of effective competition that there be relative easy entry—and a significant incidence of exit—from an industry. In this way, competition introduces fresh competitors into the industry, and entities which are not in fact—as opposed to statistically—effective competitors may be eliminated. In the banking industry, however, the "exiting" of competitors cannot appropriately take the usual forms—failures or voluntary liquidations. The failure of commercial banks is not consistent with our national policy. The voluntary liquidation of a

[27] FDIC Ann. Reps. (1962-66). See Appendix attached hereto.

bank is, similarly, almost as much to be avoided. The only acceptable means of "exit" from the industry, then, is a merger of the declining institution with one which has the capacity and demonstrated willingness to serve the community.

Relating these considerations to the Act of 1966, Congress there said that this sort of merger was to be permitted, where the agency, and, upon challenge, the court, came to a conclusion that the merger's service to the convenience and needs of the community clearly outweighed the effect on competition of the loss of the declining bank as a separate institution. Certainly, with this statutory rationale, there is no reason for this Court to join the Government in its efforts to write a qualification into the convenience and needs defense to the effect that the merger in question must—barring only mergers with larger competitors—be the sole solution to the weaker bank's problem.

Practical considerations also indicate the invalidity of the Government's position. If the Government's position were accepted, each of many possible alternative solutions to the problems of a weaker bank absorbed or to be absorbed through merger would have to be the subject of examination by the agency and proof in court. The proliferation of the issues that this would entail—and the highly speculative nature of the proofs that would have to be introduced—is obvious. This case, indeed, gives a vivid example of them. Experts summoned by the appellee banks gave their opinions as to whether Trust Co. could have been revitalized without merger. See, *e.g.*, R. 537-39, 554-57, 567, 575-77, 604-07. The Government's expert witnesses gave their opinions to the effect that a merger was not necessary to solve some or all of Trust Co.'s problems.

See, *e.g.*, 903-04, 909-12. While the District Court found that appellees' proofs were convincing and the Government's were not, the inquiry is not, we submit, required by the statute.

Perhaps the clearest example of the practical complexity which the Government's position would entail can be shown if one considers, as is necessarily implicit in the Government's position, the point that in addition to the actual merger proposed, a number of alternative mergers would have to be analyzed by the agency and the court in virtually every case. The Government here contends that a merger with Commerce Union Bank, which showed interest in buying Trust Co., must receive consideration as an alternative to the merger proposed. But logically, the Government's theory also means that the management of the stagnant bank would have to solicit a merger proposal from every bank in the community with which it might, in the light of hindsight, conceivably have merged. Moreover, the agency and the court, in the case of each bank which showed an interest in such a proposal, would have to conduct a comparative hearing into the relative effects on competition of each alternative merger, and into the quantum by which the community convenience and needs might be served by each alternative merger. Every bank merger case might thus become virtually a comparative hearing—a series of bank merger cases rolled into one. The possibility of this spectacle is, we suggest, enough to indicate the rejection of the Government's theory.

In any event, this record provides no basis for this Court to reach a decision on the extreme proposition of law advanced by the Government. The record amply sup-

ports the District Court's findings that there was no alternative to merger as a solution to Trust Co.'s problems. The only alternative merger mentioned—with Commerce Union Bank—was not shown to be less anti-competitive.

(b) *The record supports the conclusion of the District Court that no solution for Trust Co.'s problems, other than merger, was feasible.*

The District Court's opinion expressed its conclusion that revitalization of Trust Co. without merger was not feasible. (R. 104) The court found that Trust Co.'s "problems were insoluble . . . unless resort was had to a merger." (Fdg. 131, R. 132) It also found that a merger was a business necessity for Trust Co. (Fdgs. 183-84, R. 140)

The Government in effect argues that these findings of the District Court were not supported by substantial evidence. But the evidence supporting these findings is ample. Certainly one *de novo* review of the Comptroller's findings of fact in this case—by the District Court—is enough.

To begin with, the seriousness of Trust Co.'s condition had, of course, a direct bearing on the feasibility of solutions other than merger. The District Court found, notwithstanding the Government's argument to the contrary, that Trust Co.'s problems were so serious as to have brought it to the brink of "imminent deterioration." (Opinion, R. 108) Though discussed at length in our Statement hereinabove, a short and selective list of Trust Co.'s operating deficiencies apart from some of its structural weaknesses—*e.g.*, management depletion, small capital structure, overemphasis on certain types of loans, decline of its IPC demand deposits, and deterioration in its servicing of trust accounts—amply demonstrate the basis of the court's conclusion:

Inadequate and obsolete bookkeeping, accounting and auditing procedures. No automated or semi-automated procedures. (Fdgs. 179, 181; R. 139)

Absence of a credit department, and no credit specialists; not even credit files. (Fdg. 175, R. 139; Opinion, R. 102; Fdg. 111, R. 128-29)

Outmoded offices badly in need of renovation. (Fdg. 180, R. 139)

Lack of branch banking offices which are essential to effective competition. (Fdgs. 176-77, R. 139)

Inadequate management receiving inadequate wages; qualified top management no longer present; difficulty in attracting new management. (Fdgs. 129, 138, 139, 140-41, 143; R. 131, 133)

Lack of a funded pension plan. (Fdg. 138, R. 133)

Weak internal controls, *e.g.*, very little of a continuous audit program. (Fdg. 93, R. 126)

Severely limited and ineffective correspondent banking program. (Fdgs. 94-102, R. 126-27)

The evidence to support these findings was overwhelming.

For example, with respect to management problems, several of Trust Co.'s former employees testified from direct experience. Mr. Nelson, great-grandson of Trust Co.'s founder, whose grandfather and father had both been Trust Co.'s President, testified that he left Trust Co. because of better opportunities in another field (R. 653), and that at the time of his departure in 1953 Trust Co. had not yet made a basic decision to go into the commercial banking business. (R. 655) Mr. Sloan testified that Mr. Hackworth, Trust Co.'s President, had told him to go to

another bank in Nashville because the opportunity was "far better" there. (R. 569) Mr. Howell, defendants' expert on executive recruitment, stated that he would not have attempted to recruit management for Trust Co. because he did not believe he could succeed in the overall task of filling so many vacant positions adequately. (R. 549-50, 567) The departure of Messrs. Hill, Hackworth and Primm, and the fact that they were Trust Co.'s key personnel, responsible for a substantial portion of its business, is not disputed. Nor is it disputed that the salaries of Trust Co. officers and employees were substantially lower than received by their counterparts in Nashville's three major banks; lower, even, than Nashville's four smaller banks. See, *e.g.*, testimony of Mr. Futoran, R. 188-89.

Thus, in light of this and other evidence the Government's contention that nonmerger alternatives were practicable solutions for the problems of Trust Co.—and its censure of the Weaver group for not following them—are largely a consequence of the Government's unwarranted belittling of the scope and magnitude of Trust Co.'s problems. The fact is, however, that Trust Co. was a classic example of the sort of bank which the framers of the 1966 legislation envisioned as not capable of having its problems solved apart from merger. Trust Co. was a classic example of a case of the "floundering bank" in a "medium to smaller sized community"; it was a classic example, again, of a community situation where "there is a relatively small number of banks, and one or more of these banks appears to be stagnating." H.R. No. 1221, 89th Cong., 2d Sess., p. 3.

As the House Report also envisioned, Trust Co. was "below the economic minimum size to attract capable and vigorous management personnel." Under these circumstances, the House Report wisely recognized that solutions short of merger would not solve the problem; that, in our

rapidly urbanizing society, the problem of management succession for the smaller, floundering bank in the small to medium sized community was not one which readily lends itself to solution apart from merger. It was precisely in this set of circumstances that the 1966 legislation contemplated merger as a solution.

Against this backdrop, the Government still insists that Trust Co. could or should have done something apart from merger with a stronger bank. Thus, after misstating the nature of the problems which were facing Trust Co. at the time of the acquisition by the Weaver group, the Government endeavors to carp at the decision of the Weaver group to seek a merger for Trust Co. rather than undertake the enormous task of rehabilitating the bank through other means—with, of course, little likelihood of success. The Government, in this respect, disputes the District Court's findings that:

> After Weaver and associates contracted to purchase the controlling stock in Nashville Bank and Trust Company they found many problems in the bank, the seriousness of which had not been fully realized prior to the agreement to purchase. . . . (Fdg. 182, R. 139-40)

The Government also apparently challenges the findings that the Weaver Group conducted "many inquiries" regarding "the problems of Nashville Bank and Trust Company" before coming to the conclusion that "a merger with Third National Bank was the best solution to the problems and the best fulfillment of their responsibilities" (Fdg. 183, R. 140), and that "the merger was a business necessity for Nashville Bank and Trust Co. . . . " (Fdg. 184, R. 140)

But these findings are based on substantial evidence and accordingly should be sustained. It is not true, as the Government suggests (G.B. 28), that the Weaver group was fully aware of the bank's problems at the time of purchase;

the record is plain that the full impact of the problems was not realized until after the acquisition. This was particularly true with the key problems of management succession and the problems of inadequate compensation in Trust Co.'s salary structure (R. 493-94), but also included the difficulty of establishing new branch banks, inadequacies in bookkeeping and auditing procedures, lack of a funded pension plan, and the cost of remodeling and renovating the main office. (R. 37-38) Certainly the District Court's finding that the seriousness of these problems was not realized at the time of the Weaver acquisition is fully supported by this record evidence.

The Government attempts to belittle the efforts made by the Weaver group to solve the management succession problem. (G.B. 28-29) But the record is clear that Mr. Weaver discussed possible solutions of Trust Co.'s management problems with at least nine prominent outside people prior to reaching the decision to merge. (R. 537-38) Moreover, Mr. Weaver discussed the management succession problem on a number of occasions with four well-connected Nashville citizens among his own associates in the purchasing group. (R. 538)

Mr. Weaver's testimony is well supported by expert witnesses in the proceedings before the District Court. A personnel recruitment expert gave his opinion that Trust Co. management problems were "almost insurmountable" (R. 555) and, if soluble, that the solution would have been years in coming. (R. 556) Again, this evidence gives solid support to the District Court's findings that a merger was a business necessity for Trust Co. (Fdg. 184, R. 140)

In a final effort to attack these findings, the Government engages in the taking of certain liberties with the statistical information forming a part of the record. For example,

the Government claims that Trust Co. could have established new branches at a cost of only $51,000 per branch. (G.B. 29) Even a cursory glance at the Government's record reference would have indicated that the $51,000 figure is simply an estimate of the *annually recurring* charges that each branch would have entailed, at the minimum; and that a portion of the recurring charges would have consisted of the amortization of capital expenditures required for the opening of each branch, which would have been in themselves more than the annual estimate given. (R. 477)[28]

Similarly, the Government claims that a *"total expenditure"* of $575,000 would have been enough to rehabilitate Trust Co. (Emphasis supplied) (G.B. 29) But here again, the record passage cited by the Government (R. 418) is plain to the effect that the witness was *not* estimating the *total* costs that were necessary to have rehabilitated Trust Co., but was simply analyzing the effect of such of those costs as would have been incurred in a given year—1963, the last full year before the merger—on earnings for that year. The passage in question, as well as the subsequent redirect examination of the witness (R. 474-77) makes it plain that virtually all the expense of $575,000 would have been annually recurring, since it related primarily to the cost of increased salaries, additional employees, new departments, computer rental, and other expenses which could not be met simply through a one-time injection of new capital. The effect of this expenditure, then, would have been completely to wipe out Trust Co.'s earnings for an indefinite period, leaving nothing for the increment to the bank's capital structure necessary to increase loan limits, or to make needed capital improvements. Certainly the out-of-context statistics here put forward by the Govern-

[28] Annual rent at each branch was calculated at $12,000, not $412,000 as stated in the printed record. *See* Tr. 1505 ("$" inadvertently typed as "4").

ment furnish no basis for overthrowing the solid conclusion of the District Court that a merger was the only feasible solution to Trust Co.'s problems, and furnish no basis for even considering the Government's "alternative solution" theory.

(c) ***The alternative of merger with Commerce Union Bank, suggested by the Government, does not provide, in any event, the sort of alternative solution to Trust Co.'s problems that required the District Court to condemn the merger with Third National.***

The only specific alternative solution to Trust Co.'s problems put forward by the Government—albeit in the embarrassed obscurity of a footnote (G.B. 30, n. 18)—is merger with Commerce Union Bank which, like Third National, is one of the "big three" banks in Nashville. Commerce Union did indicate an interest in merging Trust Co. into it after its acquisition by the Weaver Group.

We submit that the Government's suggestion of this merger as a preferable alternative to the instant merger graphically demonstrates both the absence of any real basis on this record for an acceptance of the Government's contention concerning "alternative solutions" to the problems of a bank in Trust Co.'s position, and the essential weakness of the Government's contention as a matter of law. In the first place, a merger of Trust Co. and Commerce Union would have itself combined 26% of the banking assets, deposits, and loans in the area. More importantly, it would have had precisely the same effect on the degree of concentration in the hands of the "big three" banks in the County—so much complained of elsewhere by the Government—as did the merger which actually took place. The Government suggests that a merger which combines 26% of the area's banking assets, loans and deposits is less anticompetitive than one which combines

38%. Yet it contends that either merger would violate the competitive standard of the Clayton Act and of the Bank Merger Act of 1966.[29]

The short answer to the Government's contention is that, given the concession that the merger with Commerce Union Bank was anticompetitive enough to violate the standards of § 7, it is no longer a viable alternative to the merger at bar. The only scrap of legislative history which supports in any way the Government's position on this issue is the remark of one Congressman, during the debates on the 1966 Act, that alternatives might be explored where there was another potential purchaser "other than a competitive bank". See 112 Cong. Rec. 2445. This, Commerce Union was not.

A longer answer is that the Government's contention exalts the "numbers game"—a purely statistical approach to the serious business of antitrust enforcement—to an extent which has not been previously contemplated. The fact is that, with both of the mergers involving the combination into a single bank of a substantial portion of the banking assets, loans and deposits in the County, it is impossible to say which would have been the more anticompetitive without an exhaustive, comparative analysis of all the other circumstances. Of course, this analysis was undertaken by the District Court with respect to the merger with Third National, and it indicated that the merger was substantially *less* anticompetitive than the naked market share percentages might suggest.[30] We submit that on this record, a finding that there had been an indication of

[29] G.B. 30, n.18.

[30] By the same token, the court might find a merger with Commerce Union substantially *more* anticompetitive than anyone has yet suggested. For example, the record here showed that Commerce Union, in addition to commanding approximately 21% of the business in the area (Fdg. 66, R. 121), had 20 banking offices (8 of which were located outside of Davidson County, having been estab-

interest in Trust Co. from another of the "big three" banks would not seriously have raised the question of law posed by the Government as to whether, under the "convenience and needs" defense, the District Court must consider other possible solutions to Trust Co.'s problems than the merger at bar.

Moreover, even if it is assumed that the merger with Commerce Union would have been somewhat less anticompetitive, it does not follow that the Government has proved its point, even if one accepts its legal theory that alternative solutions must be subjected to comparative analysis by the District Court. The statute does not, of course, restrict the District Court to an analysis only of the competitive factor. It must weigh against that factor the merger's service to community convenience and needs. That is one of the basic points of the 1966 legislation. Thus, even if the District Court were required to have undertaken an exhaustive, comparative analysis of the effects on competition of the Commerce Union merger as compared to the Third National Bank merger, its task would not have been completed. It would also have been required to undertake an analysis of the extent to which the community convenience and needs would have been served by the Commerce Union merger, for even if that merger were, as the Government suggests, less anticompetitive solely on the basis of market percentages, it might not be as promotive

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lished or purchased prior to the enactment of the Tennessee law prohibiting out-of-county branching), 5 more than Third National. (R. 11) Thus a merger of Commerce Union and Trust Co. would have resulted in an entity with 29% more banking offices than the combination of Third National and Trust Co. There is also evidence in the record that Commerce Union was more of a competitor to Trust Co. than was Third National. (R. 641) In short, were a comparative analysis of the anticompetitive effects of the two mergers to be made, it might well be found that, despite the difference in the statistical percentages, the adverse effects on competition of a Commerce Union-Trust Co. merger would be more serious than those of the Third National-Trust Co. merger.

of the community convenience and needs as was the merger with Third National.[31] If it was not, even under the Government's view of the statute, the assumption that it was less anticompetitive would not make it the preferable alternative, since the statute says that one factor is to be weighed against the other.

The imposition of such a burden on the District Court, so graphically illustrated by the Government's only suggested alternative purchaser indicates the error in reading the statute in the fashion the Government suggests. Under the Government's theory, the court would have been required to undertake not simply an exhaustive analysis of the Third National merger, but one of a hypothetical Commerce Union merger as well. Indeed, there is no reason to stop with an analysis of the hypothetical Commerce Union merger. The Government urges "that all practicable alternatives to . . . [the] merger be explored" (G.B. 30). Presumably, this means that acquisitions of Trust Co. by every other bank in the county with whom a merger might possibly have been feasible would have to be analyzed in terms of their comparative effect on competition and their service to community convenience and needs. And, under *Houston*, this entire analysis would have to be performed *de novo* by the District Court.

The Government's case, it should be obvious by now, amounts to no more than an attempt to excise the convenience and needs defense from the law. Congress carefully included this defense in the 1966 legislation for the

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[31] Although the record was not made with the fulfillment of such a huge undertaking in mind, there is evidence in the record which indicates that a Trust Co.-Commerce Union merger might not have had the same measure of promotion of the community's convenience and needs as the Trust Co.-Third National merger. For example, it was indicated that Commerce Union did not offer special checking accounts, certain types of savings certificates, night transit facilities, and certain other services afforded by Third National which are now available to the clientele of Trust Co. (R. 232-33)

very purpose, as made manifest in the House Report, of permitting mergers in the case of banks "in medium or smaller-sized communities" where one of the banks was "below the economic minimum size to attract capable and vigorous management personnel" (H.Rep. No. 1221, 89th Cong., 2d Sess., p. 3). The Government now urges that such a merger is not, as a practical matter, to be allowed, unless the banks proposing to merge carry the fantastic burden of producing a comparative analysis of the pros and cons of a hypothetical merger with every other bank in the area. The imposition of that sort of burden would be tantamount to reading the defense out of the statute; and that would constitute a clear thwarting of Congress' declared intention.[32]

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[32] In passing, we must comment on a misstatement of our position which the Government has made. See G.B. 33, n.20. The Government suggests that we have contended that in some way Congress intended specifically, through the passage of the 1966 legislation, to forgive the instant merger if it was otherwise unlawful. Of course, it did not; this treatment was reserved for the three cases where a challenged merger had been consummated prior to this Court's *Philadelphia* decision. We stated in our Motion to Affirm that "We do not suggest that mergers occurring in the twilight period exemplified by this case are immunized from liability under the antitrust laws . . . " (Motion to Affirm, p. 28) What we did suggest, however, at the time of the Motion to Affirm—and which, we submit, is relevant now—is that divestiture, the usual remedy in merger cases involving consummated transactions (*United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 328 (1961)) is not appropriate here, particularly where Trust Co.'s serious problems have been publicly aired twice already. In any event, Congress has "abhorred" the relief of divestiture in a bank merger. *United States* v. *First City National Bank of Houston, supra,* at 371. The Government's brief does not appear to contemplate divestiture in this case; it simply contemplates, if the Government is successful, the entry of "an appropriate remedial decree." (G.B. 33) In the light of these extraordinary circumstances, then, the Government's suggestion that this Court reach beyond the facts of record to lay down broad principles of new law—for example, limiting the applicability of the convenience and needs defense by a so-called "alternative purchaser" exception to it—is particularly unwarranted. We believe that these extraordinary circumstances furnish a further reason why this Court should not join the Government in its effort to obtain review *de novo* of the facts as carefully analyzed and found by the District Court.

CONCLUSION

The District Court correctly concluded that, as shown by the decided preponderance of the evidence, any anti-competitive effects of the merger of Third National and Trust Co. are clearly outweighed in the public interest by the probable effect of the merger in meeting the convenience and needs of the community to be served. Its decision should therefore be affirmed.

Respectfully submitted,

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November, 1967

APPENDIX

CONCLUSION

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Respectfully submitted,

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Nashville, Tennessee

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Washington, D. C.

November, [illegible]

APPENDIX

A. Commercial Bank Offices, by Type, 1950-1966.[1]

Year	*Total Offices*	*Banks*	*Branches*
1950	19,109	14,164	4,945
1951	19,396	14,132	5,264
1952	19,675	14,088	5,587
1953	19,981	14,024	5,957
1954	20,324	13,881	6,443
1955	20,818	13,756	7,062
1956	21,420	13,680	7,740
1957	21,979	13,607	8,372
1958	22,608	13,540	9,068
1959	23,276	13,486	9,790
1960	24,103	13,484	10,619
1961	24,943	13,444	11,499
1962	25,930	13,439	12,491[2]
1963	27,234	13,582	13,652[2]
1964	28,546	13,775	14,771[2]
1965	29,736[3]	13,818	15,918[3]
1966	30,872	13,785	17,087

[1] Data for 1950-1966 from Annual Reports of the Federal Deposit Insurance Corporation, as of December 31, as follows: for 1950-59, 1964-65 from Table 101; for 1960-63 from Table 102; for 1966 from Table 1, p. 4.

[2] Includes a few seasonal offices of State banks members of the Federal Reserve System and insured State banks not members of the F.R.S. which were not in operation December 31.

[3] Includes a few seasonal offices which were not in operation December 31.

B. New Commercial Banks and Commercial Banks Absorbed, 1962-1966.[4]

Year	*New Banks*	*Banks Absorbed*	*Net change attributable to new banks and absorptions*
1962	179	180	— 1
1963	300	152	148
1964	335	133	202
1965	198	147	51
1966	122	137	— 15
1962-66	1,134	749	385

[4] FDIC Ann. Rep., 1962-66.